

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT E. BUNYAR
Claimant

VS.

MIDLAND CARE CONNECTION, INC.
Respondent

AND

**UNITED WISCONSIN INSURANCE CO.
and KANSAS ASSOCIATION OF HOMES
FOR THE AGING INSURANCE GROUP**
Insurance Carriers

Docket No. 1,048,294

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, United Wisconsin Insurance Co. (United Wisconsin), requested review of the August 26, 2010, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on December 2, 2010. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Kendall R. Cunningham, of Wichita, Kansas, appeared for respondent and its insurance carrier United Wisconsin. Michael L. Entz, of Topeka, Kansas, appeared for respondent and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group (Homes for the Aging Ins.).

The Administrative Law Judge (ALJ) found that claimant's injury was the result of cumulative trauma sustained during the time claimant continued to work after feeling additional pain in his low back in December 2008 or January 2009 through his last day worked, September 21, 2009. The ALJ then concluded that with a date of accident of September 21, 2009, liability and responsibility for benefits due to claimant lies with respondent and United Wisconsin, which became respondent's workers compensation insurance carrier on April 1, 2009. The ALJ found that claimant had a functional

impairment of 10 percent that was separate and isolated from his preexisting functional impairment. Next, the ALJ found that claimant had a work disability of 81.25 percent based on a task loss of 62.5 percent and a wage loss of 100 percent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent and United Wisconsin argue that claimant suffered a single traumatic event on September 21, 2009, rather than a series of microtraumas.¹ Accordingly, respondent and United Wisconsin argue claimant's current impairment attributable to this injury must be judged based on his medical condition prior to September 21, 2009, versus his condition afterwards. They argue the evidence does not show that claimant had a permanent increase in any physiological finding associated with the September 21, 2009, event. Respondent and United Wisconsin also contend that claimant is not permanently, totally disabled.² They also argue that although being discharged for cause is no longer a defense to a work disability, it should be taken into consideration in the Board's determination of the nature and extent of claimant's work disability. Respondent and United Wisconsin contend that in the event the Board finds claimant has permanent functional impairment resulting from the September 21, 2009, accident, the Board should reduce claimant's impairment by 30 percent, the amount of impairment Dr. P. Brent Koprivica concluded claimant had before the accident of September 21, 2009.

Respondent and Homes for the Aging Ins. argue the record does not support that claimant suffered a compensable injury until September 21, 2009, which was after this carrier's period of coverage ended.³

Claimant argues he suffered a series of accidents at work from January 2009 through September 21, 2009, in which he permanently aggravated, accelerated or intensified his preexisting low back condition. Claimant asks the Board to affirm the ALJ's findings that he had an additional functional disability from his series of accidents of 10 percent over and above any preexisting impairment and that he had an 81.25 percent work disability.

¹ Although in their Application for Review by the Workers Compensation Appeals Board (filed September 3, 2010), respondent and United Wisconsin presented the issue as "[w]hether the claimant met with an accidental injury which arose out of and in the course of his employment with respondent," in their brief to the Board (filed October 14, 2010) they admitted "[t]here is not a dispute that the claimant suffered a single traumatic event on September 21, 2009, when he was helping co-workers move an obese patient."

² In his brief to the Board, claimant does not ask the Board to find he is permanently, totally disabled, but asks that the Board affirm the ALJ's finding that he has an 81.25 percent work disability.

³ Their coverage ended March 31, 2009.

The issues for the Board's review are:

- (1) Did claimant suffer a series of microtraumas from January 2009 through September 21, 2009, or did he suffer a single traumatic accident on September 21, 2009?
- (2) What is the nature and extent of claimant's disability?
- (3) Should the claimant's disability be reduced by any preexisting percentage of impairment?

FINDINGS OF FACT

Claimant was employed by respondent for over 15 years. In 2003, he had problems with his back that resulted in surgery. He testified he did not know if his 2003 back injury was caused by his work activities, but he described having back pain after sleeping on the ground on a camping trip. As a result of his back problems, claimant had surgery on November 20, 2003, performed by Dr. Michael Smith, in which he had a decompression and fusion at the L4-5 level. He went back to work on February 12, 2004. He worked light duty as a triage nurse for a couple of months and then went back to full duties. He was released from treatment with no restrictions. He testified he had no problems with his back after the surgery until about December 2008. He was active and participated in golf, worked in the yard, and performed normal household duties.

Claimant testified that toward the end of 2008 and in January 2009, he started having pain and neuropathy in his back. In January 2009, claimant had an incident at work in which he was helping remove a deceased patient from a car when he felt a twinge in his back. The pain was not immediately severe, but he developed pain a day or two later. The pain became worse, and, on his own, claimant returned to see Dr. Smith on January 30, 2009. He reported to Dr. Smith that he had low back and right leg pain. Claimant did not report an injury to respondent, nor did he request medical treatment. There was no mention of a work injury in Dr. Smith's office notes.

Dr. Smith took x-rays and ordered an MRI of claimant's lumbar spine. The x-rays showed claimant's previous instrumented L4-5 decompression and fusion. The MRI, which was done on February 3, 2009, identified the previous surgery at L4-5 and also identified some degenerative bulging at L3-4 and some degeneration at L5-S1. Dr. Smith opined that the degeneration in claimant's low back was in line with the natural course of degeneration. He sent claimant to Dr. Giroux for a cortisone injection on February 10, 2009. Claimant returned to Dr. Smith on February 17, 2009, at which time he said he was doing better. Dr. Smith then released him to return to work on February 24, 2009. Claimant stated that part of the time he was off in February 2009 was due to his taking bereavement leave after the death of a family member.

Claimant testified that after he returned to work, he continued to have some pain while performing his job duties. He testified that he went to see Dr. Ebeling for a second opinion, and Dr. Ebeling sent him to Dr. Giroux in April 2009 for a second cortisone injection.⁴ Although claimant had a good result from the February 2009 injection, he felt no relief from the injection he received in April 2009. Claimant said during that time he rated his level of pain as a 3 to 4 on a scale of 0 to 10 and was placed on some nerve medication by Dr. Giroux. He also testified he was taking some pain medication prescribed by his primary care physician.

On September 21, 2009, claimant had a specific injury at work when he was helping move an obese patient from a gurney to a bed. As claimant was repositioning the patient, he felt a sharp pain in his back and started to have severe back spasms. Claimant reported the accident to his supervisor, Susan Larison. Ms. Larison took him to St. Francis Hospital, where he was seen by Dr. Mead. Dr. Mead diagnosed claimant with a work related low back sprain and gave him restrictions not to lift anything over 20 pounds.

Kim Fellows, respondent's human resources coordinator, testified that on September 21, 2009, she was notified that claimant was going to respondent's occupational medical provider because he had injured his back during work hours. Respondent's policy is that post-accident drug testing be performed. St. Francis Hospital personnel tried to obtain a urinalysis from claimant to perform the drug test, but he refused to provide one. A hospital employee called Ms. Fellows about this. Ms. Fellows instructed the hospital personnel to give claimant a copy of respondent's policy to reinforce that the requirement to provide a urine sample was standard practice and that his employment could be jeopardized by failure to do so. The hospital called back and said claimant was still refusing, and Ms. Fellows told them to continue to treat claimant and then ask him to report back to respondent when he was finished.

Claimant testified he was not under the influence of any drugs or alcohol but was insulted and surprised that he was being asked to give a urine sample. Ms. Fellows testified that the requirement to provide a drug sample after a work injury was a policy change made by respondent in September 2008. Ms. Fellows said respondent made an announcement of the change, and claimant was vocal about his opposition to the change. After claimant's refusal to provide a urine sample for testing, a decision was made by the director of patient services and respondent's CEO to terminate claimant. When claimant came back to respondent's facility after his medical treatment, Ms. Fellows offered to let him take a drug test, but he continued to refuse. He was then terminated. Claimant has not worked since September 21, 2009. He said he went on one interview after his termination, but it was so painful he decided he was not going to seek employment.

⁴ Claimant did not say when he saw Dr. Ebeling, only saying it was after he had been released by Dr. Smith in February 2009 and before the April 2009 cortisone injection.

On October 6, 2009, claimant went to see Dr. Smith at the request of respondent. Claimant told Dr. Smith that on September 21 he was transferring a patient at work when he had onset of discomfort in his low back. Claimant complained of low back pain into his right leg, much the same as his complaints in January 2009. Claimant said he was better on October 6, 2009, than he had been on September 21, 2009. Dr. Smith's impression was that claimant had strained his low back at work on September 21, that claimant always has some low back complaints, and that the strain portion had resolved and claimant was back to his baseline. Dr. Smith did not believe that it was necessary to complete any additional diagnostic testing or order any treatment.

Dr. Smith said that on October 6, 2009, claimant got on and off the examination table slowly. But he testified that nothing in his examination of claimant on October 6 led him to believe that claimant had further injured himself in the September 21 incident or damaged the area of his spine that had previously been fused. Dr. Smith did not believe claimant had aggravated any underlying condition. He did not think the back strain claimant suffered in September 2009 caused any further damage to claimant's back. He released claimant to return to his regular job with no restrictions.

Dr. P. Brent Koprivica, a board certified independent medical examiner, examined claimant on January 2, 2010, at the request of claimant's attorney. Claimant told Dr. Koprivica that he had decompression and instrumented fusion surgery at L4-5 in 2003. Following the surgery, claimant was off work for a couple of months, then returned to work doing telephone work for a couple of months, and then was transferred back to being a hospice nurse. Claimant denied having permanent work restrictions once he recovered from the 2003 surgery. Claimant told Dr. Koprivica that he did well after the 2003 surgery. He said he did have some back pain occasionally, for which he would take a Percocet. But he was not having symptoms in his lower extremities on a regular basis. In December 2008, however, claimant began having some increased back pain. In January 2009, claimant had an incident when he felt a twinge in his back after transferring a deceased individual from a car onto a bed. Over the next few days, claimant experienced an increase in his back pain as well as radicular symptoms into his right thigh. Claimant gave Dr. Koprivica a history of his treatment by Dr. Smith as well as his evaluation by Dr. Ebeling.

Claimant told Dr. Koprivica that on September 21, 2009, he had a work-related accident where he injured his back while transferring a 350 to 400 pound paraplegic patient from a gurney to a bed. Claimant was seen in the emergency room at St. Francis Hospital, where he was seen by Dr. Mead. On October 6, 2009, claimant was seen by Dr. Smith, who diagnosed him with a probable lumbosacral strain at the L3-4 level.

Claimant complained to Dr. Koprivica of ongoing increased back pain. He said he was limited in his ability to perform activities of daily living. He complained of pain if he walked, stood or sat more than 30 to 45 minutes. He had sleep interruptions. He said he had numbness in his right thigh and a burning dysesthesia on the right lateral thigh. He

complained of pain that radiated down his back into the anal area, and he had bilateral upper buttock pain. In his examination, Dr. Koprivica found claimant had spasms during testing. He had decreased range of motion. Dr. Koprivica said he believed claimant's prior fusion contributed to claimant's decreased range of motion. However, he said some of claimant's decreased range of motion related to his September 2009 injury.

After examining claimant, Dr. Koprivica opined that claimant's work as a hospice nurse exposed him to risks, such as lifting and bending, that were unique to his employment. He opined that claimant's work activities for respondent were the direct, proximate and prevailing factor in the series of injuries sustained by claimant over time, especially from January 2009 until his last specific incident on September 21, 2009. Further, Dr. Koprivica opined that claimant suffered an aggravating injury at the adjacent segment of L3-4 with the development of right lumbar radicular symptoms. He concluded that claimant was at maximum medical improvement. He also believed that claimant was temporarily totally disabled for the six-week period prior to February 24, 2009, and for the period from September 21, 2009, through October 6, 2009. Dr. Koprivica admitted he could not find anything in the records he reviewed that related to a work injury in January 2009, other than what had been reported to him by claimant himself. His opinion that claimant was temporary totally disabled for approximately six weeks prior to February 24, 2009, is based on claimant's estimate that he was off work that length of time. Dr. Koprivica admitted he found nothing in the medical records to substantiate an off-work period for the six week period prior to February 24, 2009.

For the period of time between April 2009, when claimant had his last cortisone injection, to September 2009, when claimant had his last injurious incident at work, he had been taking Gabapentin and Percocet in an attempt to control his symptoms. This indicated to Dr. Koprivica that claimant was continuing to be symptomatic before the event that occurred on September 21, 2009. From the medical information Dr. Koprivica reviewed, he found nothing that indicated a documented change in claimant's body after the event that occurred on September 21, 2009. There was no EMG/NCT testing to document which level claimant's radicular pain was coming from. However, Dr. Koprivica testified that the fact that claimant clinically responded to his first injection at the L3-4 level makes it probable that was the symptomatic level.

Based on the *AMA Guides*,⁵ Dr. Koprivica stated that claimant had a preexisting 20 percent whole person impairment from his 2003 surgery. In regard to a series of accidents from January 2009 through September 21, 2009, Dr. Koprivica rated claimant as having a DRE Category III impairment for a 10 percent whole body impairment. This was based on the segment abnormalities at L3-4 and treatment for a new lumbar radiculopathy from that motion segment. Dr. Koprivica was unable to apportion claimant's 10 percent

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

impairment between claimant's two specific incidents, those being in January 2009 and September 2009 but said it was for claimant's series from January to September 2009.

Dr. Koprivica restricted claimant's lifting to 20 pounds or less occasionally. He also said claimant should avoid frequent or constant bending at the waist, pushing, pulling, or twisting. He needed to avoid sustained or awkward postures of the lumbar spine. Dr. Koprivica also restricted claimant entirely from squatting, crawling, kneeling, or climbing and said claimant should avoid whole body vibrations. Claimant also needs to recline unpredictably, and should have postural allowances in terms of sitting, standing and walking. Dr. Koprivica said all these restrictions are causally related to the injury claimant sustained in a series of traumas through September 21, 2009.

Dr. Koprivica reviewed a task list prepared by Dr. Robert Barnett. Of the 24 job tasks identified on the list, Dr. Koprivica opined that claimant is unable to perform 15 for a 62.5 percent task loss. This represents his opinion with regard to task losses that claimant has sustained as a result of the series of injuries through September 21, 2009. Dr. Koprivica believes that claimant may be totally, occupationally disabled from any nursing position that requires patient transferring.

Dr. Robert Barnett is a clinical psychologist who also holds credentials as a rehabilitation counselor, rehabilitation evaluator, job placement specialist, and workers compensation vendor. At the request of claimant's attorney, Dr. Barnett met with claimant, in part to create a list of the tasks claimant had performed in the 15-year period before his injury. Dr. Barnett spoke with claimant by telephone on March 20, 2010. Together, claimant and Dr. Barnett came up with a list of 24 tasks that claimant had performed in the last 15 years he worked for respondent.

At the time of the interview with Dr. Barnett, claimant was 59 years old. He had a Bachelor of Science in nursing from Washburn University. Claimant was CHPN (hospice and palliative care) certified. In the 15 years before his injury, claimant had worked for only one employer, that being respondent.

At the time Dr. Barnett interviewed claimant, claimant believed he was not physically capable of working, and he was not seeking employment. Dr. Barnett did not believe claimant was capable of engaging in substantial, gainful employment, despite his having a nursing degree, because of his physical restrictions. He did not think claimant could do a sedentary job because of his having to move around and being limited in how long he can sit. Also, claimant complained of chronic and severe pain most of the time, which would make it difficult to work.

Michelle Sprecker, a vocational rehabilitation counselor, met with claimant on May 25, 2010, at the request of respondent. Ms. Sprecker identified 34 tasks that claimant performed in the 15-year period before his injury.

Claimant was not working at the time of the interview and had been awarded Social Security disability. Ms. Sprecker, however, believed that there are jobs available that would meet claimant's physical limitations. Taking into consideration his education, work history, physical restrictions and geographical area, Ms. Sprecker opined that claimant could return to the nursing field as a nurse case manager, telephonic triage nurse, utilization review nurse, or office nurse. She reviewed the labor market and found openings existed. She does not believe that claimant is permanently, totally disabled.

Claimant told Ms. Sprecker that he had to lie down three or four times during a two-hour period. Ms. Sprecker said that Dr. Koprivica did not specifically outline in his restrictions the frequency with which claimant needs to lie down, nor the duration. She said Dr. Koprivica's restriction that claimant be allowed to recline unpredictably would not necessarily preclude claimant from engaging in substantial and gainful employment, but claimant would have to be selective in his employment. He would need to find an employer willing to accommodate him and have a break room. She believes a nurse case manager position or telephone triage nurse position could offer that flexibility. However, she also said that restriction might limit claimant to part-time employment.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁸

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁰ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹¹

K.S.A. 2009 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be

⁸ *Id.* at 278.

⁹ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁰ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹¹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-510e states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.¹²

¹² See *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

ANALYSIS

In the Award, the ALJ said:

In order to determine the date of accident, it needs to be decided if the Claimant's injury resulted from a single traumatic event or was the result of a series of events repetitive use or microtraumas. Claimant had worked after having back surgery in 2003 without incident. However, in late 2008, Claimant began having more low back pain than he had in the preceding four years. One incident where Claimant transferred a deceased patient caused Claimant increased back pain and sent Claimant on his own to Dr. Michael Smith. Claimant was taken off work and treated with injections to the L3-L4 position of his spine. The initial injection gave Claimant a lot of relief and Claimant went back to work without restrictions on February 24, 2009. Claimant returned to work with back pain and continued to work with increasing discomfort. On September 21, 2009, Claimant was assisting in the transfer of a very obese patient and Claimant felt a severe sharp pain in his back with back spasms of the type he had not had on prior occasions. Claimant reported the accident to his supervisor and requested medical care. Respondent provided medical care on September 21, 2009. Dr. Mead who treated the Claimant on September 21, 2009 restricted Claimant to no lifting over twenty pounds. Dr. Koprivica opined that the injury Claimant had was cumulative over time until the last exposure on September 21, 2009.

Claimant's injury was the result of the cumulative trauma over a period of time after Claimant continued to work after initially feeling additional pain in his low back. According to K.S.A. 44-508(d) the date of accident is when the Claimant is first restricted from performing work or taken off work by the authorized treating physician. In this case, Dr. Mead, who was the authorized treating physician, restricted the Claimant's work by restricting him to no lifting over twenty pounds. That is the date of accident, September 21, 2009.¹³

The Board agrees with and affirms the ALJ that claimant suffered a series of accidents and, therefore, his date of accident is controlled by K.S.A. 2009 Supp. 44-508(d).

In *Saylor*,¹⁴ the Kansas Court of Appeals held:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which

¹³ ALJ Award (Aug. 26, 2010) at 7.

¹⁴ *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 207 P.3d 275 (2009), rev. granted May 18, 2010; see also *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker.¹⁵

Further, the court stated: "In this case, the 2005 addition to K.S.A. 2008 Supp. 44-508(d) creates the presumption that the legislature intended to change the date of injury for an 'accident' from the bright-line rule of the last day worked."¹⁶

Claimant testified that after his surgery in 2003, he was eventually released and returned to work with respondent without restrictions, performing his regular job duties until September 21, 2009, when he was given a 20 pound lifting restriction by the authorized treating physician. Thus, under K.S.A. 2009 Supp. 44-508(d), claimant's date of accident is September 21, 2009.

Two physicians testified concerning the nature and extent of claimant's disability. Dr. Koprivica opined that claimant had an additional 10 percent permanent impairment of function over and above the 20 percent that preexisted this series of accidents. Dr. Smith, conversely, believed that claimant has no additional impairment over that which preexisted from the prior injury and fusion surgery. Both Dr. Smith and Dr. Koprivica believe claimant has disabling pain which limits his activities.

The Board finds claimant has new symptoms, including pain, and is in need of permanent restrictions. That pain and need for restrictions is a result of the series of work-related accidents and injuries that occurred through September 21, 2009. The ALJ found Dr. Koprivica's opinions concerning functional impairment more credible than those of Dr. Smith. The ALJ further found Dr. Koprivica's opinion as to claimant's restrictions and loss of task performing ability credible. The Board agrees claimant has lost the ability to perform 62.5 percent of the tasks he performed during the 15 years before his accident. When averaged with his 100 percent wage loss, claimant's work disability is 81.25 percent. Pursuant to K.S.A. 2009 Supp. 44-501(c), claimant's 20 percent preexisting impairment should be deducted from this percentage of work disability, for a net permanent partial disability of 61.25 percent.

CONCLUSION

(1) Claimant suffered a series of microtraumas from January 2009 through September 21, 2009.

(2) Claimant has an additional 10 percent permanent impairment of function and an 81.25 percent work disability from this series of accident and injuries.

¹⁵ *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, Syl. ¶ 4.

¹⁶ *Id.* at 1048.

(3) Claimant had a 20 percent preexisting impairment of function, which reduces his permanent partial disability award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 26, 2010, is modified to find claimant's permanent partial disability is 61.25 percent, but is otherwise affirmed.

Claimant is entitled to permanent partial disability compensation at the rate of \$546.00 per week not to exceed \$100,000 for a 61.25 percent work disability. As of January 26, 2011, there would be due and owing to the claimant 70.29 weeks of permanent partial disability compensation at the rate of \$546 per week in the sum of \$38,378.34 for a total due and owing of \$38,378.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$61,621.66 shall be paid at the rate of \$546 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier United Wisconsin
Michael L. Entz, Attorney for Respondent and its Insurance Carrier Homes for the Aging Ins.
Rebecca A. Sanders, Administrative Law Judge